

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of ) MM Docket No. 94-34  
Commission's Equal )  
Employment Opportunity Rules )  
  
To: The Commission

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JUN 28 1994

REPLY COMMENTS

1. American Telecasting, Inc ("ATI"), by its attorneys, hereby respectfully submits its Reply Comments in response to the Notice of Inquiry, FCC 94-103 ("NOI") in the above-referenced proceeding released by the Commission on April 21, 1994.<sup>1/</sup> ATI is a public company that is the country's largest provider of wireless cable service. As the leading member of an industry whose development the Commission has repeatedly cited as the means by which to obtain much-needed competition to coaxial cable operators, ATI welcomes the Commission's examination of the effectiveness of its Equal Employment Opportunity ("EEO") rules.

2. ATI concurs in many of the comments and recommendations that were submitted in response to the NOI. While ATI is a great supporter of the objectives behind the Commission's EEO rules, as evidenced by its own hiring practices, it agrees with many of the commenters that the past application of those rules have often seemed to indicate that the EEO reporting procedures are more important than the underlying policy and goal of those rules. This

<sup>1/</sup> By Order Granting Motion for Extension of Time to File Comments, DA 94-495, released May 16, 1994, the FCC extended the Reply Comment date to June 28, 1994.

has been the experience of ATI in attempting to comply with the myriad of EEO requirements first imposed upon it this year as a "Multichannel Video Programming Distributor" under the EEO provisions of the Cable Act of 1992. Often, the reporting procedures required by the Commission are so burdensome and put such a drain on the time and resources of the reporting organization that they end up doing more harm than good to an entity's employment diversity. ATI requests that the Commission utilize the comments received in this proceeding to revise its EEO rules to emphasize the attainment of its stated objectives of program and employment diversity, rather than strict compliance with its complicated record keeping and reporting requirements, which are often at odds with those goals.

I. CURRENT APPLICATION OF THE EEO RULES PUTS FORM OVER SUBSTANCE AND THEREBY DEFEATS THE POLICY BEHIND THE RULES.

3. In its NOI, the Commission succinctly articulated the objectives behind its EEO rules:

The overriding goal underlying our EEO rules is to promote program diversity. In addition, our EEO rules enhance access by minorities and women to increased employment opportunities, which are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership.<sup>2/</sup>

Thus, the goal of the Commission's EEO rules is to encourage diversity, both in programming and among the employees of the telecommunications industry. In many ways, the current EEO rules defeat this important objective by placing more importance upon

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<sup>2/</sup> NOI at 1, ¶ 1.

whether a telecommunications firm is in literal compliance with the reporting procedures, than upon the diversity that actually exists in the firm's programming and employment practices.

4. Many of the organizations that submitted comments in response to the NOI provided specific examples of where and when the Commission makes its required record keeping more important than actual diversity in assessing a licensee's EEO program. A radio station in Texas lost two minority employees immediately before it had to file its EEO report. The station owner filled out its EEO report accurately, yet was fined \$37,500 because it was unable to be credited for the actual diversity that had existed at the station.<sup>3/</sup> The records were more important than the station's actual diversity in programming and employment.

5. One commenter expressed concern that the Commission's requirement of obtaining minority and female applicant referrals may actually hinder diversity. If the number of minority referrals must be reported, why would a telecommunications entity hire a "walk-in" minority applicant or an individual who submitted an unsolicited resume?<sup>4/</sup> If diversity is the goal of the EEO rules, the way a person is hired should not be the issue, particularly since referrals increase the cost and time expended for personnel procedures by an entity. The issue should be who is ultimately hired.

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<sup>3/</sup> See Comments of Sunburst II, Inc, My Country, Inc, and Louisiana Media Interests, Inc.

<sup>4/</sup> See Comments of La Paz Broadcasting, Inc.

6. A third commenter provided two examples of how the Commission appears to view form over substance in EEO matters. First, if an organization promotes from in-house and has no need for minority referrals, the Commission could still cite the lack of minority referrals as being a concern about that entity's lack of diversity.<sup>5/</sup> The same commenter offers real proof that the Commission prefers form over substance: ninety-nine percent (99%) of the jobs at its station are filed by minorities and women, but, because the station did not maintain records of every referral and effort to recruit women and minorities, it has suffered forfeitures and licensing penalties.<sup>6/</sup> Again, these are examples in which a firm is not credited for its actual diversity, but actually is penalized because it did not attain that diversity in the proper manner.

7. Finally, one commenter, which was found to not have discriminated in its hiring process, was nevertheless fined \$37,500 by the Commission because the station did not have an "adequate pool of minority applicants and kept inadequate records" of recruitment efforts and results.<sup>7/</sup> Again, actual diversity was penalized because it was not attained in a proper fashion.

8. ATI supports these telecommunications entities in their common recommendation that the Commission not view form over

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<sup>5/</sup> See Comments of WXDJ-FM.

<sup>6/</sup> Id.

<sup>7/</sup> See Comments of First Greenville Corporation.

substance in enforcing its EEO rules.<sup>8/</sup> The stated policy goal is to create program and employment diversity, yet the procedures which the Commission requires telecommunications entities to use to demonstrate their efforts at increasing diversity clearly serve to undermine that goal, as seen by the above examples. The Commission must revise its EEO rules so that the emphasis is upon actual diversity, not just good record keeping.

II. THE RECORD KEEPING THAT IS REQUIRED BY THE COMMISSION'S EEO RULES IS AN ONEROUS BURDEN ON COMMISSION LICENSEES

9. The Commission's EEO rules require that telecommunications entities maintain complex records of their hiring processes. Such records must indicate every employee, every job applicant, how the employer advertised for applicants, where every job applicant heard about the job, the race and sex of every job applicant and employee, and the job titles and job categories of every employee.<sup>9/</sup> The amount of information that the Commission so requires telecommunications entities to record and report is certainly a burden for licensees of small entities with few employees in small markets.<sup>10/</sup> If it is a burden even for small entities, it must also be a burden for those telecommunications

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<sup>8/</sup> See also Comments of Ocean Drive Communications, Inc. at 1, Comments of K/A Korp Communications, Inc. at 2, Comments of WJBC-WNBQ Twin Cities at 2, Comments of Radio-Chattanooga at 2, Comments of WXDJ-FM at 1, Comments of KUTZ-FM at 1.

<sup>9/</sup> See Federal Communications Commission Forms 395, 395A, 395M, 395B, 396, and 396A.

<sup>10/</sup> See Comments of Tom S. Whitehead, Inc. at 3, Comments of KPAN at 2, Comments of La Paz Broadcasting at 6.

entities with many employees and many job openings who have much more information to record and report.

10. Some of the commenters suggest that smaller entities should have lesser or no record keeping requirements because they have less resources than other entities.<sup>11/</sup> ATI supports reduced record keeping and reporting requirements for all entities, not just for smaller companies. The larger the organization, the greater the amount of resources expended for record keeping and reporting. The record keeping and reporting is a drain on the resources of all telecommunications organizations. The purpose behind the requirements is to encourage diversity, and if diversity exists, the record keeping and reporting should become less important.

11. ATI also supports the suggestion of some filers that record keeping and reporting be required only for those organizations that do not sufficiently recruit or hire minorities and women.<sup>12/</sup> In particular, one commenter suggests that, where an organization meets at least fifty percent (50%) of parity with the representative work force in the county, it should not need to keep records.<sup>13/</sup> If an entity were to fall below this fifty percent (50%) cutoff, it would then be required to maintain records, in

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<sup>11/</sup> See Comments of WNNJ-AM and FM at 2, Comments of Houston Christian Broadcasters at 2-3, Comments of Bresson Hafler Media Group at 1, Comments of Tom S. Whitehead, Inc. at 3-4.

<sup>12/</sup> See Comments of Tom S. Whitehead, Inc. at 3-4.

<sup>13/</sup> Id.

addition to being fined.<sup>14/</sup> A policy such as this would further the Commission's goal of diversity while, at the same time, serving to lessen the burden and expense placed on licensees.

III. LICENSEES SHOULD NOT BE PENALIZED WHEN REFERRAL AGENCIES DO NOT REFER JOB APPLICANTS

12. Currently, telecommunications entities are required to obtain minority and female applicant referrals whenever a position becomes available.<sup>15/</sup> Many of the comments submitted indicate that this practice is rarely a useful source of job applicants,<sup>16/</sup> yet licensees are still required to expend valuable resources doing this. This time and money could be put to much better use by the telecommunications entities in the development of new programming, greater involvement in public service in their communities, and the ability to offer higher salaries and therefore attract both more qualified applicants and greater numbers of applicants.

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<sup>14/</sup> Id.

<sup>15/</sup> A telecommunications entity should:  
[u]se minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever job vacancies are available in its operation.

47 C.F.R. §73.2080(c)(2), 47 C.F.R. §76.75(b) (1993).

<sup>16/</sup> See Comments of Grants Pass Broadcasting Corporation at 1, Comments of Sunburst II, Inc., My Country, Inc. and Louisiana Media Interests, Inc., Comments of K/A Korp Communications, Inc. at 2, Comments of Mountain Lake Public Broadcasting at 1, Comments of WOLC-FM at 1, Comments of KUTZ-FM at 2.

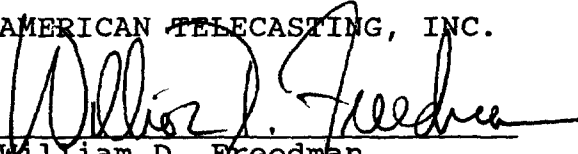
IV. CONCLUSION

13. ATI agrees with, and supports many of the comments submitted in this proceeding. For the reasons noted above, the Commission should clarify its EEO rules in order that diversity is not lost to the complicated record keeping and recruitment requirements now imposed by those rules. Such clarification will serve the public interest by ensuring that the limited resources of reporting entities may be devoted to their primary objective of providing service to the public.

Respectfully submitted,

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